KERAJAAN MALAYSIA

v.

CHEN BOON HEOW

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
ABDUL KADIR SULAIMAN JCA
MOHD NOOR AHMAD JCA
[CIVIL APPEAL NO: A-01-102-1999]
22 JANUARY 2002

CIVIL PROCEDURE: *Res judicata - Conditions for application of doctrine - Refusal to file notice of discontinuance - Civil suit still pending - Whether doctrine applicable*

EQUITY: *Defences - Laches and acquiescence - Whether there was evidence of laches - Whether possible to raise laches as a defence in current application when laches committed in another suit*

COMPANY LAW: *Winding-up - Proof of debts - Whether proved - Whether appellant should obtain final judgment before filing proof of debt*

The appellant filed an originating summons in the High Court urging the court to make an order that a proof of debt filed by the appellant with the respondent be accepted and that the respondent pays the appellant the sum as stated in the proof of debt. The respondent claimed that the amount stated in the proof of debt has not been proven since the claim is the subject matter of a civil action ('civil suit no. 796 of 1982') which has not been decided by the High Court. The High Court dismissed the appellant's application, hence this appeal.

Held:
Per Mokhtar Sidin JCA

[1] The refusal by the appellant to file the notice of discontinuance was not sufficient to show that civil suit no. 796 of 1982 ('the suit') had been discontinued. Since the appellant did not proceed further than obtaining the consent of the company, the suit is still pending and alive in the High Court. It has not been terminated yet unless action has been taken by either party to terminate it. For that reason, the learned judge erred in coming to the conclusion that the principle of *res judicata* applied in the present action because there was no final decision in respect of the suit. (p 128 e-g)

[2] The appellant had not committed any laches in respect of the present application which would warrant its dismissal. Even if the learned judge was referring to the laches in the suit, there was no determination of who was guilty of laches in that suit, and even assuming that the appellant was guilty of laches, it should be raised in that suit and not in the present application. It was totally unacceptable to raise laches as a defence in the present application when the laches were committed in another civil suit. (pp 128 h-i & 129 d-f)

[3] In the present application, the proof of debt filed has not been proven as ordered by the Federal Court, and if the appellant's claim is allowed, this would be reversing the decision of the Federal Court which this court is not entitled to do. Hence, the appellant should proceed to obtain final judgment in the High Court in respect of the suit, and with that judgment, it can then file the proof of debt with the respondent. (p 131 d-h)

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu telah memfailkan satu saman pemula dalam Mahkamah Tinggi yang mendesak mahkamah supaya membuat satu perintah bahawa bukti hutang yang difailkan oleh perayu dengan responden hendaklah diterima dan bahawa responden hendaklah membayar perayu jumlah sepertimana yang dinyatakan di dalam bukti hutang. Responden mendakwa bahawa jumlah yang dinyatakan di dalam bukti hutang telah tidak dibuktikan oleh kerana tuntutan tersebut adalah hal perkara suatu tindakan sivil ('guaman sivil no. 796 tahun 1982') yang mana masih belum diputuskan oleh Mahkamah Tinggi. Mahkamah Tinggi telah menolak permohonan perayu, dengan itu menyebabkab rayuan ini.

Diputuskan:
Oleh Mokhtar Sidin HMR

[1] Keengganan oleh perayu untuk memfailkan notis pemberhentian tidak memadai untuk menunjukkan bahawa guaman sivil no. 796 tahun 1982 ('guaman tersebut') telah dihentikan. Oleh kerana perayu tidak meneruskan selanjutnya dari tahap mendapatkan kebenaran mahkamah, guaman tersebut adalah masih menanti penyelesaian serta masih hidup di dalam Mahkamah Tinggi. Ianya masih belum ditamatkan lagi kecuali tindakan telah diambil oleh mana-mana satu pihak bagi menamatkanya. Atas alasan itu, hakim yang bijaksana telah tersilap dalam mencapai kesimpulan bahawa prinsip *res judicata* terpakai dalam tindakan semasa kerana tidak terdapat keputusan muktamad berhubung guaman tersebut.

[2] Perayu telah tidak melakukan sebarang kelewatan berhubung dengan permohonan semasa yang akan mewajarkan pemberhentiannya. Meskipun jika hakim yang bijaksana merujuk kepada kepada kelewatan di dalam guaman tersebut, tidak terdapat penentuan mengenai siapa yang bersalah atas kelewatan di dalam guaman itu, dan meskipun menjangkakan bahawa perayu bersalah kerana kelewatan, ianya haruslah dibangkitkan dalam guaman itu dan bukan dalam permohonan semasa. Adalah sesungguhnya membangkitkan kelewatan adalah tidak boleh diterima sebagai pembelaan dalam permohonan semasa sedangkan kelewatan itu dilakukan dalam guaman sivil yang lain.

[3] Dalam permohonan semasa, bukti hutang yang telah difailkan masih belum dibuktikan sepertimana yang diperintahkan oleh Mahkamah Persekutuan, dan jika tuntutan perayu dibenarkan, ini akan mengakaskan keputusan Mahkamah Persekutuan yang mana mahkamah ini tidak berhak untuk lakukan. Oleh itu, perayu haruslah meneruskan untuk mendapatkan penghakiman muktamad dalam Mahkamah Tinggi berhubung guaman tersebut, dan dengan penghakiman itu, ianya dengan itu boleh memfailkan bukti hutang tersebut dengan responden.

[Rayuan ditolak.]

Legislation referred to:
Income Tax Act 1967, s. 108
Rules of the High Court 1980, O. 14

For the appellant - Abu Tariq Jamaluddin (Hazlina Hussain)
For the respondent - James Loh Ching Yew; M/s James CY Loh & Co

[Appeal from High Court, Ipoh; Originating Summons No: 21-35-1999]

Reported by Suresh Nathan

JUDGMENT

Mokhtar Sidin JCA:
The appellant in this appeal is the Government of Malaysia. The respondent is Chen Boon Heow who is the liquidator of Syarikat Sin Hwa Plantations Sdn. Bhd. We have dismissed the appeal earlier and we now give our reasons for doing so.

On 21 June 1999, the appellant filed an originating summons in the High Court at Ipoh moving the court to make an order that the proof of debt filed by them with the respondent be accepted and that the respondent do pay the appellant the sum as stated in the proof of debt. Syarikat Sin Hwa Plantations Sdn. Bhd. (hereinafter referred to as "the company") had been voluntarily wound up and the respondent was appointed the liquidator. On 6 May 1997 the appellant affirmed the proof of debt as follows:

1. That the abovenamed Company was at the date of the order for Winding-up the same, *viz*: the 12th day of May 1996 and still is justly and truly indebted to (d) The Government of Malaysia in the sum of RM618,394.67 for (e) Income Tax as shown by the account endorsed hereon, or by the following account, *viz*" "MNI" for which sum or any part thereof I say that I have not nor hath (f) anyone of any person by (g) their order to my knowledge or belief for (g) their use had or received any manner of satisfaction or security whatsoever, save and except the following (h).

Exhibit MNI which was filed together with the proof of debt read:

X/C 0860125.09

Year of Assessment 1979	RM 519,583.60		
Penalty 10% and 5%	80,535.45	RM	600,119.05
Year of Assessment 1980	RM 26,269.20		
Penalty 10% and 5%	4,071.72	RM	30,340.92
Court Fees		RM	350.00
		RM	630,809.97
Less: Credit		RM	12,415.30
		RM	618,394.67

The assessment forms (Form J) in respect of the years of assessment 1979 and 1980 which form the basis of MNI are also exhibited. On 29 May 1999, the respondent by a notice of rejection of proof of debt rejected the proof of debt filed by the appellant and gave the following reasons for rejecting.

1. The Revenue is estopped from pursuing its claim further (through winding up proceedings) by the legal principle of *res judicata* because it seeks "to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings": The Federal Court in Civil Appeal No. 335 of 1984 had Ordered on the 21st day of January, 1986 that the alleged debtor (the said company) be given leave to defend in High Court Civil Suit No. 796 of 1982, after having considered the statement of claim of the Revenue, the statement of defence of the alleged debtor, and the affidavits in Order 14 proceedings.

Alternatively,

2. The Revenue by seeking to enforce its claim in winding-up proceedings is committing an abuse of process of law by trying to relitigate the dispute over the alleged debt although there is no longer a dispute, because –

(1) unconditional leave to defend was given to the alleged debtor by the Federal Court in Federal Court Civil Appeal No. 335 of 1984;

(2) the Revenue as plaintiff in High Court Civil Suit 796/1982 (and applicant under Order 14 proceedings for summary judgment) has now withdrawn its claim;

(3) laches on the part of the Revenue – plaintiff in pursuing its claim since January 1986 (the date of the Order of the Federal Court granting unconditional leave to defend) whether by way of civil suit, or by winding up proceedings.

Alternatively,

3. The Revenue is guilty of laches: the protracted and inordinate delay in pursuing its claim pursuant to the Order of the Federal Court in Civil Suit No. 335 of 1984 amounts to approximately twelve and a half years; this represents a vexatious course of action.

Alternatively,

4. The revenue is committing an abuse of process of law by seeking to sideline the Order of the Federal Court having previously filed a statement of claim in High Court Civil Suit No. 796 of 1982.

Alternatively,

5. The Revenue has not furnished proof of the debt allegedly owing to it by the alleged debtor although it was given the opportunity to do so by the Federal Court.

For the abovementioned reasons either singly or in combination, I as liquidator hereby reject the Revenue's claim.

Being dissatisfied with that rejection, the appellant took up the present application claiming that the amount stated in the proof of debt is the amount of tax payable and due from the company. In the originating summons the appellant seek the following reliefs:

(a) The proof of debt dated 6 May 1997 be accepted and retained.

(b) The respondent be ordered to pay the amount as stated in the proof to the appellant from the disposal of the assets of the company.

The present action being an originating summons rests entirely on the evidence adduced by way of affidavits. From the various affidavits filed, the case for the appellant is that the respondent was wrong in rejecting the proof of debt. The respondent, on the other hand, claimed that the amount stated in the proof of debt have not been proven since the claim is the subject matter of a civil action which has not been decided by the High Court.

It is not disputed that the appellant filed a claim against the company *vide* Civil Suit No. 796 of 1982 in the High Court at Ipoh. The claim is for the sum due in respect of assessments for the years of assessment 1979 and 1980 (the same sum that the appellant is claiming in the present proof of debt).

The appellant then proceeded to obtain final judgment under O. 14 of the Rules of the High Court. In that process the appellant filed the requisition notice under s. 108 of the Income Tax Act 1967 to prove that the amount claimed is due and payable from the company. The appellant succeeded in obtaining summary judgment under O. 14 in the High Court. The company, being dissatisfied, appealed to the Federal Court against that decision (Federal Court Civil Appeal No. 335 of 1984). On 21 January 1986, the Federal Court allowed the appeal by the company whereby the company was given unconditional leave to defend and the summary judgment given by the High Court was set aside. The case was remitted back to the High Court. It is clear to us that when the Federal Court made its decision, the requisition notice under s. 108 of the Income Tax Act 1967 is not conclusive of the amount of tax due and payable from the company. The Civil Suit No. 796 of 1982 is yet to be heard. No reason was given by the parties for the delay. In the meantime, the company was wound up voluntarily and the respondent was appointed the liquidator.

The respondent being the liquidator then sent the necessary notices to the various creditors (including the appellant) to file their proof of debts. The appellant then filed the proof of debt which was rejected by the respondent as we have stated earlier. We have also stated the reasons for the rejection earlier. Being dissatisfied with the rejection the appellant filed the present action.

In the High Court the respondent pleaded *res judicata.* The respondent claimed that when Civil Suit No. 796 of 1982 was remitted back to the High Court, the case was not fixed for hearing. The appellant then prepared a notice of discontinuance dated 26 November 1998 in respect of Civil Suit No. 796 of 1982 and sent it to the solicitors for the company who duly signed the document signifying the company's consent. This document was produced at the trial. For some reason the appellant changed their mind and did not file the notice of discontinuance. The respondent relied on this notice even though it was not filed in court and contended that the appellant is estopped from bringing up the present action because of *res judicata.* Apparently, this found favour with the learned judge when in his judgment he said:

> ... Sin Hwa telah digulungkan pada 12.5.1996. Pada 13.6.1998, LHDN telah menulis kepada responden menyatakan bahawa LHDN akan menarik balik tuntutannya (lihat Esbt. CBH-3 di kand. 10). Notis pemberhentian kesnya juga telah ditandatangani oleh kedua-dua pihak (lihat Esbt. CBH-2 di kand. 8). Bagaimanapun, LHDN juga menyatakan hasratnya untuk tidak menarik balik Bukti Hutang yang telah disampaikan ke atas responden, dan memberi pandangan bahawa Bukti Hutang itu tidak bergantung kepada sesuatu penghakiman Mahkamah (lihat Esbt. CBH-3).

Peguam responden, Encik James Loh telah berhujah bahawa dengan adanya notis pemberhentian oleh LHDN, maka tuntutannya adalah dianggap telah selesai, dan oleh itu, keputusan Mahkamah Persekutuan pada 21.1.1986 adalah muktamad. Permohonan ini, hujah peguam merupakan helah LHDN untuk menghidupkan balik tuntutannya yang sudah selesai. Tambah lagi, dalam keadaan Sin Hwa telahpun digulung, LHDN tidak sepatutnya dibenarkan membuat tuntutannya. Encik James Loh juga berhujah bahawa di peringkat rayuan ke atas penghakiman terus, Mahkamah Persekutuan telah mempertimbang tuntutan LHDN dan telah membenarkan perayu/defendan membela kes ini.

LHDN telah gagal mengambil apa-apa tindakan selama 13 tahun dan selain daripada prinsip mencegah kelewatan (laches), LHDN juga terikat dengan doktrin *res judicata* dan tidak boleh dengan permohonan ini cuba mengungkit kembali tuntutannya.

Mahkamah ini bersetuju dengan hujah peguam responden di atas isu *res judicata* ini. ...

Berdasarkan keputusan Mahkamah-mahkamah tertinggi di atas, saya memutuskan bahawa keputusan Mahkamah Persekutuan pada 21.1.1986 untuk mengetepikan penghakiman terus yang diperolehi JHDN, dan seterusnya kegagalannya untuk meneruskan pendakwaan kesnya, serta keputusan LHDN untuk memberhentikan tindakan ini (walaupun notis pemberhentian telah tidak difailkan) telah menimbulkan keadaan di mana penghakiman Mahkamah Persekutuan tersebut menjadi satu kebenaran yang kini muktamad dan terikat kepada LHDN mengikut doktrin *res judicata*.

Mahkamah juga memutuskan bahawa kesepian LHDN untuk bertindak dan mendakwa kesnya selama 13 tahun ini juga memprejudiskan kedudukan pemohon. Seharusnya LHDN meneruskan tuntutannya selepas keputusan Mahkamah Persekutuan itu. Tiada pula penjelasan diberi mengapa LHDN telah gagal berbuat demikian. Bagaimanapun setelah meneliti latar belakang permohonan ini, adalah jelas kepada Mahkamah ini bahawa sebenarnya LHDN telah berniat untuk tidak meneruskan dengan tuntutan asalnya melalui writ samannya. Kini di peringkat penggulungan syarikat Sin Hwa LHDN telah cuba menghidupkan kembali tuntutan asal dengan cara jalan yang lain iaitu dengan menggunakan Bukti Hutang. Kelewatan untuk bertindak oleh LHDN selama ini, bagi saya, membawa kesimpulan bahawa LHDN telah menerima keputusan Mahkamah Persekutuan dan mengakui bahawa defendan (Sin Hwa) mempunyai pembelaan terhadap tuntutan asal LHDN. Oleh itu, Mahkamah ini telah mengambilkira faktor kelewatan melampau oleh LHDN dan memutuskan bahawa permohonannya sekarang merupakan satu proses yang disalahgunakan, dan harus dibatalkan. (Lihat *Cheah Kim Tong v. Taro Kaur* [1989] 2 CLJ 791; [1989] 1 CLJ (Rep) 378).

> Relief yang diminta oleh LHDN dalam permohonan ini adalah sebenarnya agar mahkamah ini membuat satu deklarasi yang LHDN berhak menuntut jumlah wang yang dinyatakan dalam Bukti Hutangnya. Dalam melaksanakan kuasa budibicaranya untuk membenarkan relief sebegini, mahkamah boleh mengambilkira keadaan sekeliling kes ini dan menolak permohonan ini dalam keadaan di mana telah didapati sebagai fakta yang tidak dicabar, bahawa LHDN telah bersalah dengan kelewatan melampau dan telah berdolak-dalik tanpa munasabah (guilty of inordinate delay dan unreasonable vaccillation – lihat kes Mahkamah Agung, *Haji Hussin bin Hj. Ali & Ors. v. Datuk Haji Mohamed bin Yaacob & Ors* [1983] 2 CLJ 68; [1983] CLJ (Rep) 165).

From the above passages it is clear to us that the learned judge relied on *res judicata* and laches to dismiss the appellant's application.

With the greatest respect to the learned judge we are of the view that the learned judge have erred in coming to the conclusion that *res judicata* applies in the present case. The only point that the learned judge came to that conclusion is that the solicitors for both parties signed the notice of discontinuance. For that reason, Civil Suit No. 796 of 1982 is deemed to be discontinued. In our view, the mere signing of the notice of discontinuance is not sufficient. That document has to be filed in court and the court have to make the necessary order to strike out Civil Suit No. 796 of 1982. Apparently, this part of the action never came into being because the appellant changed their mind and did not file the notice of discontinuance. This fact is confirmed by the legal officer appearing before us. What is the consequences of the refusal by the appellant to file the notice of discontinuance? In our view, at the most there was a breach of etiquette on the part of the appellant but it is not sufficient to show that the Civil Suit No. 796 of 1982 have been discontinued. Since the appellant did not proceed further than obtaining the consent of the company, Civil Suit No. 796 of 1982 is still pending and alive in the High Court. It has not been terminated yet unless action have been taken by either party to terminate it. For that reason the learned judge erred in coming to the conclusion that the principle of *res judicata* applies in the present action because there is no final decision in respect of Civil Suit No. 796 of 1982 yet.

The second ground relied upon by the learned judge is that the appellant are guilty of laches. Are the appellant guilty of any laches in the present application? From the record, the proof of debt was affirmed by the appellant on 6 May 1997 and the respondent rejected the proof of debt on 29 May 1999. On 21 June 1999 the appellant filed the present application. As far as we can see from the record, the appellant have not committed any laches in respect of the present application which warrant the dismissal of the present application. For laches to be taken as a defence, they should exist in that application. We are of the view that the appellant have not committed any laches in the present application.

The learned judge may be referring to the laches in Civil Suit No. 796 of 1982 since it is one of the grounds stated by the respondent in rejecting the appellant's proof of debt. From the history of that case it is clear that the Federal Court remitted that case back to the High Court for a full trial on 21 January 1986 with the order that the company be given unconditional leave to defend. We are not sure whether the company have filed their defence to set the trial into motion. There is no evidence in respect of this. We are not sure whether summons for direction have been complied with. The only thing we are certain is that the said civil suit have not been listed for hearing. We are not sure why it takes so long for the civil suit to be heard. Is it the fault of the appellant or the company or for that matter the court itself, for not fixing the case for hearing? We are more inclined to say that the blame on the delay is on the company. It is noted that the Federal Court made the order to remit the case back to the High Court on 26 January 1996 and on 12 May 1996 the company was wound up. There is no evidence to show that the liquidator has been substituted for the company for the civil suit to be set in motion. No evidence whatsoever have been adduced to show what actually happened to the parties in that civil suit. It is clear to us that there is no determination of who is guilty of laches in respect of Civil Suit No. 796 of 1982. Secondly, even assuming that the appellant is guilty of laches it should be raised in that civil suit and not in the present application. The company could raise it as a defence or alternatively the company could apply to strike out the appellant's claim in that civil suit for want of prosecution of the claim because of laches. It is obvious to us that the company or the respondent did neither of this. If the company or respondent succeeded in striking out the claim only then the respondent could raise the decision in that civil suit as a defence in the present application. It is totally unacceptable to us to raise laches as a defence in the present application where the laches committed is in another civil suit. We are mindful that the subject matter in the present application, that is the proof of debt is the same subject matter of the Civil Suit No. 796 of 1982. The similarity ends there.

As we have said earlier, the decision in Civil Suit No. 796 of 1982 should have great repercussions to the present application. Assuming that the company or the respondent succeeded in striking out the appellant's claim in Civil Suit No. 796 of 1982 due to laches or otherwise, then that decision could be used as a defence to the present application, such as estoppel because of *res judicata*. Until that is done the present application should be treated separately from the civil suit. Any defence to the present application should be confined within the perimeter of this application. In our view, the appellant have not committed any laches in the present application. In fact from the chronology of events in the present application the appellant have acted promptly.

From the above we find that the learned judge have erred when he dismissed the appellant's application due to laches.

Even though we disagree with the learned judge in respect of his reasoning in dismissing the appellant's application, nevertheless we agree with his conclusion in dismissing the appellant's application.

From the evidence it is not disputed that the proof of debt filed by the appellant is the same amount of the claim which is the subject matter of Civil Suit No. 796 of 1982. It is also not disputed that the appellant filed the requisition notice under s. 108 of the Income Tax Act in their application for summary judgment in Civil Suit No. 796 of 1982. Normally, that notice would be accepted as a proof that the amount stated therein as tax due and payable and the Government is given leave to enter final judgment under O. 14 of the Rules of the High Court. This is precisely what happened in the High Court. The Federal Court reversed the High Court's decision and gave leave for the company to defend meaning that the certificate under s. 108 of the Income Tax Act 1967 is not conclusive proof of the sum due and payable. The case was remitted back to the High Court for full trial whereby the appellant has to prove to the satisfaction of the court what is the actual amount due from the company.

When the appellant filed their proof of debt, the proof of debt affirmed is the same amount as the one stated in the certificate under s. 108 of the Income Tax Act 1967 which had been rejected by the Federal Court. The relevant provisions in respect of proof in the winding-up Rules provide:

78. Proof of debt

In a winding-up by the Court every creditor shall prove his debt, unless the Judge in any particular winding-up shall give directions that any creditors or class of creditors shall be admitted without proof.

79. Mode of proof

A debt shall be proved in any winding-up by delivering or sending to the liquidator an affidavit verifying the debt together with the prescribed filing fee.

81. Contents of proof

(1) An affidavit proving a debt may be in Form 55 and shall contain or refer to a statement of account showing the particulars of the debt, and shall specify the vouchers, if any, by which the same can be substantiated.

(2) The liquidator to whom the proof is sent may at any time call for the production of the vouchers.

92. Examination of proof

The liquidator shall examine every proof of debt lodged by him and the grounds of the debt, and shall in writing admit or reject it, in whole or in part, or require further evidence in support of it. If he rejects a proof he shall state in writing in Form 59 to the creditor the grounds of the rejection.

93. Appeal by creditor

If a creditor or contributory is dissatisfied with the decision of the liquidator in respect of proof, the Court may, on the application of the creditor or contributor, reverse or vary the decision; but subject to the power of the Court to extend the time, no application to reverse or vary the decision of the liquidator in a winding-up by the Court shall be entertained, unless notice of the application is given before the expiration of twenty-one days from the date of service of notice of rejection.

It is clear to us under those rules the debt due must be proved. In the present application it is obvious to us that the proof of debt filed has not been proven yet. The appellant have yet to prove the amount due and payable from the company in court as ordered by the Federal Court.

After perusing the reasons for the rejection we are of the view that the respondent was right in rejecting the appellant's proof of debt as stated in ground five of the notice of rejection where it states:

5. The Revenue has not furnished proof of the debt allegedly owing to it by the alleged debtor although it was given the opportunity to do so by the Federal Court.

In other words the Federal Court is not satisfied that there is conclusive proof that the company owed the appellant the sum that is claimed in Civil Suit No. 796 of 1982. Until the court finds for the appellant, the sum claimed is still disputed. The court may find that the appellant are entitled to the full amount or part of the amount or none at all. If we allow the appellant's claim in the present application, it would mean that the appellant is entitled to the claim as stated in Civil Suit No. 796 of 1982 without it being proven in court. In other words, this would be contrary to the decision of the Federal Court which have given the order for the appellant to prove their claim in Civil Suit No. 796 of 1982 in court. If this is done we are in fact reversing the decision of the Federal Court which we are not entitled to do. For that purpose the appellant should proceed to obtain final judgment in the High Court in respect of Civil Suit No. 796 of 1982 and with that judgment they can then file the proof of debt with the respondent.

We are mindful of the fact that by the time the final judgment is obtained, the assets of the company which are now in the hands of the respondent would have been dissipated. The appellant have themselves to blame for it because it is clear to us from the record that the Federal Court gave the order for the full trial on 21 January 1986 but the appellant did nothing to move the court for an early hearing of Civil Suit No. 796 of 1982. By the time this application was made so many things have happened including the fact that the company had been wound up and the respondent was appointed the liquidator. We sympathise with the appellant but there is nothing we could do.

For the above reasons we find that there is no merit in this appeal. We find that the learned judge came to the right conclusion but we are unable to agree with the reasons he has stated in his judgment. The appeal is hereby dismissed with costs.